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No. 82-2157

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In The
Supreme Court of the United States
October Term, 1982

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CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND AND CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,

Petitioners,

vs.

CENTRAL TRANSPORT, INC., et al.,

Respondents.

—o—

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

—o—

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QUESTION PRESENTED

Whether a multiemployer employee benefit fund maintained for Union workers can force a contributing employer to disclose confidential records concerning employees the Union has determined are not performing Union work in contravention of the Trust Agreement creating the Fund and in the absence of reasonable cause to believe that a particular employee should be a Fund beneficiary.

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CENTRAL TRANSPORT, INC., et al.,[1]

Respondents.

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Central Transport, Inc., et al., ("Transport") files its Brief in Opposition to the Petition for Writ of Certiorari ("Petition") of Central States, et al., ("Funds").

OPINIONS BELOW

The opinion of the district court is reported at 522 F. Supp. 658 and is attached to the Petition as Appendix

[1]Respondents, collectively styled Central Transport, are: Central Transport, Inc., Central Cartage Co., Quad State Leasing, Inc., Cadillac Leasing, Inc., Dunes Leasing, Central Recapping, Inc., Michiana Trucking, Inc., Company 17, Danville Illinois Leasing, Michigan Express, Mohawk Cartage, Mohawk Motor, Inc., Flint Cartage, Bancroft Freight Lines, McKinlay Transport, Ltd., and Genessee Cartage.

A. The unanimous opinion of the Court of Appeals for the Sixth Circuit is reported at 698 F. 2d 802 and is attached to the Petition as Appendix B.

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JURISDICTION

The judgment of the Court of Appeals was entered on January 20, 1983 and is attached to the Petition as Appendix C. An Order deny rehearing *en banc* was entered on April 8, 1983 and is attached to the Petition as Appendix D. Jurisdiction of this Court has been invoked by Petitioner under 28 U. S. C. § 1254(1).

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STATUTE INVOLVED

Sections 1102 through 1105 of the Employee Retirement Income Security Act of 1974, 29 U. S. C. § 1001 ("ERISA") attached as Respondent's Appendix A.

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STATEMENT OF THE CASE

Transport is a common carrier of goods for hire in intrastate and interstate commerce. Transport and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and its various locals ("Union") are parties to the National Master Freight Agreement, parts of which are attached to the Petition as Appendix E and/or supplemental, individual agreements (collectively, "Collective Bargaining Agreements").

The Collective Bargaining Agreements create pension and health and welfare plans to which Transport contributes for the benefit of individual Union members. The Collective Bargaining Agreements also establish Trust Agreements which create the Funds. Parts of the Trust Agreements are attached to the Petition as Appendix F. The Funds are entities totally separate from the labor organizations and the participating employers. They are creatures of the Collective Bargaining Agreements between the Union and participating employers like Transport.

As a party to the Collective Bargaining Agreements, Transport became obligated to make, did make, and continues to make contributions to the Funds for the benefit of Transport employees who are covered by the Collective Bargaining Agreements and are eligible for benefits from the Funds. The Funds are charged with the fiduciary duty to receive and manage employer contributions for the benefit of Funds beneficiaries. However, the Funds have had many of their money management duties assigned to professional managers through a consent judgment with the Department of Labor, which settled allegations of gross mismanagement and assured that Funds money would not be managed by the Funds' trustees.

Transport's operations are conducted by both Union ard non-Union employees. Approximately sixty (60%) percent of Transport's employees are not covered by the Collective Bargaining Agreements. As to those employees, Transport is not required to make contributions to the Funds.

All of Transport's employees who meet the ERISA definition of "participant" are entitled to participate in

some employee benefit plan. On behalf of those employees covered by the Collective Bargaining Agreements, Transport contributes to the Funds. For those employees *not* covered by a Collective Bargaining Agreement, Transport contributes to its own defined benefit pension plan (the "Company Plan") which has been maintained since 1965, fully complies with ERISA and was approved by the Internal Revenue Service as a tax qualified plan. Any employee qualifying for coverage under the plans maintained by the Funds automatically is disqualified from coverage under the Company Plan. The result of any determination that a particular employee is performing Collective Bargaining Agreement work is to shift that employee from coverage under the Company Plan to coverage under the Funds. The result to the employee in that event could be the forfeiture of nonvested Company Plan benefits.

Transport and the Union determine which of Transport's employees are performing work under the Collective Bargaining Agreements and therefore are entitled to benefits contributions they receive from Transport. The right of any worker to receive benefits administered by the Funds is determined by whether he is covered by the Collective Bargaining Agreements. Those workers performing work covered by the Collective Bargaining Agreements are entitled to contributions to the Funds by Transport for their benefit. Those workers performing work ***not*** covered by the Collective Bargaining Agreements are not entitled to such contributions. The Union has always vigorously and effectively insured that all employees performing work under the Collective Bargaining Agreements receive all employee benefits to which they are entitled, including contributions to the Funds.

Neither the Collective Bargaining Agreements nor the Trust Agreements expressly provide that employers are required to furnish the Funds with employment records of all persons employed. Employers need only furnish records as to those persons *covered under the Collective Bargaining Agreements.*

On December 5, 1979, the Funds notified Transport by mail that an inspection of Transport's employment records would be made beginning during the week of January 14, 1980. On or about February 4, 1980, and continuing thereafter without interruption, the Funds' auditors conducted their audit of Transport's employment records. During the period of this audit, Transport offered to, and did, provide the appropriate records of its employees who were *covered* by the applicable Collective Bargaining Agreements but has refused to supply records for its employees who were not covered by the Collective Bargaining Agreements. Thereafter the audit was terminated.

The Funds instituted this action seeking a preliminary injunction requiring Transport to provide the Funds with confidential information of *all* of its employees—both those covered by the Collective Bargaining Agreements and those *not* covered by the Collective Bargaining Agreements. The Funds argued that they had a (i) contractual right under Article III, section 5 and Article IV of the Trust Agreements, (ii) statutory right under 29 U.S.C. §§ 1102-1105 (which lists trustee powers) and 29 U.S.C. § 1059 (which describes employer record keeping requirements), and (iii) common law right to review records of *all* employees. Transport contested these allegations up-

on contractual and statutory grounds, and upon the need for confidentiality of non-covered employee records.

Circuit Judge Cornelia Kennedy wrote a unanimous opinion of the Court of Appeals for the Sixth Circuit reversing the trial court, finding *inter alia* that (i) no contractual or statutory right to inspect records of non-covered employees exists, (ii) analogies to collective bargaining and NLRB disclosure rules cases are inapposite, (iii) the Funds are protected from liability if they do not review such records, (iv) the employees have adequate means through individual actions, the Union and the Secretary of Labor to prove they should be covered by the Collective Bargaining Agreements, (v) a prudent man would not expend Funds money to launch an audit of the records of *all* of Transport's employees under these facts, and (vi) the decision to commence such an investigation would be arbitrary and capricious and the expenditure of money for such an investigation unreasonable.

The Court did, however, grant the Funds the right to investigate the records of those four employees not on the Union seniority list for which the Funds had "reasonable cause" to believe were covered employees.

The Funds have petitioned this Court to allow the Funds to demand confidential records of employees who have not collectively bargained for such disclosure *without* reasonable cause to believe that those employees are covered by the Collective Bargaining Agreements.

———o———

REASONS FOR DENYING THE PETITION

1. The Petition Should Be Denied Because The Decision Of The Court Of Appeals Is Based Upon Specific Language Of The Trust Agreements Between Transport And The Union Which Created The Fund.

This matter is a simple question of contract interpretation, *i. e.*, whether the Trust Agreements define "employee" as *all* employees of Transport or employees of Transport covered by the Trust Agreements and Collective Bargaining Agreements.

The Sixth Circuit correctly found "the term 'employee', as used in the foregoing provision of the trust agreements, is not all-inclusive and does not comprehend *all* employees of Transport" (Petition Appendix B, p. A-20; emphasis in original) for two reasons.

First, "[n]on-covered employees are outside the scope of the collective bargaining agreements" (Petition Appendix B, p. A-21) so that contributions to the Funds are not part of the employment benefit package of non-covered employees. The Funds conceded in their Brief before the Sixth Circuit that:

(1) ". . . the Trust Agreements, the audit engagement letter, and the Central States Pension Fund refer to the collective bargaining agreement as the source of covered employment. [reference omitted]. This is uncontested and obvious." (Brief of Petitioner before 6th Cir. at p. 22); and

(2) "The Funds, of course, are not parties to the collective bargaining agreement which is, admittedly, the source of an employer's obligation to contribute. Certainly, the Trustees have no authority to *determine* coverage, that is to say to *define* and *decide* what job classifications *should*

be covered by the contract." (Brief of Petitioner before 6th Cir. at p. 29; emphasis in original); and

(3) ". . . only 'covered employees' may be defined as 'participants' and . . . the Trustees' fiduciary duties extend only to them." (Brief of Petitioner before 6th Cir. at p. 31).

Thus, the Sixth Circuit decision that the Funds cannot expand the term "employee" beyond the definition in the Trust Agreements is correct since the Funds admit that the Collective Bargaining Agreements determine covered employment, that the Collective Bargaining Agreements are the source of Transport's obligation to contribute to the Funds, that only employees covered by the Collective Bargaining Agreements may be Funds beneficiaries, and that the Funds are not parties to the Collective Bargaining Agreements.

Second, "[n]on-covered employees of Transport are outside the definitions of 'employee' contained in Article I, section 3 of the trust agreements." (Petition Appendix B, p. A-21). Subsection 3(a) identifies all employees of Transport who are covered by the Trust Agreements. The Sixth Circuit correctly found that Subsection 3(a) provides that "[a] person is an employee under the trust agreements if he or she is employed under the terms and conditions of a collective bargaining agreement *and* is a person, *i. e.*, a covered employee, on whose behalf payments are required by the collective bargaining agreement." It is written in the conjunctive; both conditions must be found for a person to meet the definition of employee.

The Court properly noted that limiting the definition of employee to covered employees (1) is consistent with the bargained for benefit negotiated only for Transport's covered employees (Petition Appendix B, p. A-24), (2) compliments the definition of employer under the Trust Agreements (Petition Appendix B, p. A-25), (3) was intended by the Union and Transport since they could easily have used the ERISA definition of employee *or* expressly stated that the definition includes *all* employees (Petition Appendix B, p. A-25), and (4) is consistent with proper contractual construction (Petition Appendix B, p. A-25).

If the definition of employee covers non-covered employees, the Funds must provide Funds benefits for them. The parties to the Collective Bargaining Agreements did not intend that result since Transport is only required to contribute for covered employees.

The Court held that Article IV of the Trust Agreements gives the Funds the authority to inspect Transport's records of any *particular employee* if the Funds have reasonable cause to believe that the employee is performing bargaining unit work but has not been classified by the Union and Transport as a covered employee. The Funds, however, want this Court to grant them the power to launch fishing expeditions into Transport's confidential records *in the absence* of reasonable cause to believe that the employee whose records are reviewed is performing work under the Collective Bargaining Agreements. The Sixth Circuit has been fair to the Funds—they are only prevented from acting totally beyond the scope of the Collective Bargaining Agreements. Even the Secretary of Labor must have good cause to investigate under

ERISA. (Petition Appendix B, p. A-30 n. 5). The decision below accords the Funds the authority necessary to conduct a complete audit.

To launch an audit of the records of all of Transport's employees, sixty (60%) percent of whom are not covered by the Collective Bargaining Agreements, is arbitrary and capricious (Petition Appendix B, p. A-32) and is itself a breach of the Funds' fiduciary duty by wasting Fund assets (Petition Appendix B, p. A-30).

2. The Petition Should Be Denied Because The Cases Cited By The Funds To Show An Alleged Inconsistency Between The Case Below And Other Circuits Are Totally Inapposite.

The Funds claim that the decision below is inconsistent with the decisions of this Court and decisions in the Third, Fifth and Eighth Circuits.

Third Circuit: *Rosen v. Hotel and Restaurant Employees, Local 274,* 637 F.2d 592 (3d Cir.), *cert. denied,* 454 U. S. 898 (1981). The Funds are attempting to mislead this Court into believing that the Funds determined plan participation in *Rosen.* At all relevant times, Mr. Rosen was a dues paying member of the union which collectively bargained for the benefit plan. Mr. Rosen's eligibility and coverage were already determined—the sole question was whether the employer was contributing for this admittedly covered participant. The very quote cited by Petitioner at pp. 13-14 of his Petition speaks to Rosen's "[c]ontinued eligibility."

Fifth and Eighth Circuits: *Robbins v. Prosser's Moving and Storage Co.* and *Robbins v. Schneider Moving Co.,* 700 F.2d 433 (8th Cir. 1983) and *Bugher v. Consoli-*

dated X-Ray Service, 705 F.2d 1426 (5th Cir. 1983) hold that fund trustees need not await completion of arbitration before bringing a court action to collect delinquent contributions. The Sixth Circuit did not require the Funds to exhaust a grievance remedy before coming to court. The Funds received a court decision. They simply do not like the decision they received.

Accordingly, no inconsistency among the Circuits exists. The only similar case is *Central States, Southeast and Southwest Areas Pension Fund v. CRST*, 641 F.2d 616 (8th Cir. 1981) which also holds that the Funds are limited to records of covered employees. The Funds would have this Court believe that *CRST* was "substantially overruled" (Petition at p. 29) by *Robbins, supra*. In actuality, *Robbins* only stated that *CRST's* decision should not be read to require arbitration prior to filing a court action:

> "We hold only that the trustees may come into court without first getting the union to invoke the machinery of arbitration. To the extent that *Farmer, Layne-Western* and *CRST* are inconsistent with this holding, they are overruled."

Robbins, supra at 443.

3. The Petition Should Be Denied Because There Is No Statute Authorizing The Funds To Act For Non-participants.

Judge Kennedy correctly found in the unanimous opinion of the Sixth Circuit that ERISA requires a fiduciary to act:

(1) "solely in the interest of the participants and beneficiaries" which does not include non-covered employees (Petition Appendix B, p. A-19) and

(2) "in accordance with the documents and instruments governing the plan" which includes the Collective Bargaining Agreements between Transport and the Union and the Trust Agreements (Petition Appendix B, p. A-19).

In fact, the Sixth Circuit unanimously found that the Funds had a fiduciary duty ". . . not to undertake unreasonable investigations or inspections to pursue employee coverage or waste trust assets by unreasonably broad audits" (Petition Appendix B, pp. A-29-30), and that "[a] prudent man would not authorize the audit of the records of all of Transport's employees under these circumstances." (Petition Appendix B, p. A-30).

Before the Sixth Circuit, Petitioner alleged an analogy to NLRB disclosure rules. The Court held that the standard of disclosure to the Union under collective bargaining cases was different than that under multiemployer benefit plans to which the Funds were not even parties. Moreover, even if the labor standard were applied, the Funds failed to show the relevance of the information requested and failed to show that the rights of Transport and its non-covered employees were taken into account (Petition Appendix B, p. A-32).

The Funds have now raised an analogy to Fair Labor Standards Act cases (which was never asserted in the Courts below) and which similarly fails to reverse the clear mandate of ERISA to act "solely in the interests of participants and beneficiaries" (Petition Appendix B, p. A-19) and "in accordance with the documents and instruments governing the plan." (Petition Appendix B, p. A-19). The Funds have not been granted a statutory investigative power analogous to the Department of Labor

under the Fair Labor Standards Act. The Secretary of Labor has been given that right under ERISA, and then only upon good cause shown. The Sixth Circuit stated:

> "It seems unlikely that Congress would have imposed a good cause predicate to investigations by the Secretary of Labor but intended that benefit fund trustees have the duty to examine all records." (Appendix B, p. A-30 n. 5).

4. The Petition Should Be Denied Because Finding A Duty To Investigate Records Of All Employees Would Result In Total Chaos.

If the Funds prove a statutory duty to investigate records of *all* employees of an employer which contributes to their multiemployer benefit plan, the result will be chaos. Transport contributes to several multiemployer plans, each of which would have a *duty* to investigate records of *all* employees to ferret out a possible beneficiary somehow forgotten by his Union, forgotten by the Department of Labor, forgotten by the employer and forgotten by the employee himself. Complying with those investigations would require employees dedicated to no other task.

Moreover, a multiemployer plan which represents a handful of beneficiaries at a given company would be charged with a duty to investigate thousands of employee records to seek out possible beneficiaries that the Union felt were not covered by the applicable collective bargaining agreements. Clearly, those funds would be breaching their duty to identified beneficiaries if they expended the required time, money and effort to search for additional beneficiaries and participants and would also be breach-

ing their new found duty of investigation if they did not so investigate. The cost of such duplicative investigations would be staggering.

CONCLUSION

The unanimous decision of the Sixth Circuit determined this contract controversy and properly balanced the desire of the Funds for auditing rights with the need for protecting the confidential records of employees who had not contracted through the Union for such disclosure. Potential beneficiaries are protected through the efforts of the Union in vigorously enforcing the Collective Bargaining Agreements which are the source of the Funds themselves.

Respectfully submitted,

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APPENDIX A

29 U. S. C. §§ 1102-1105

§ 1102. Establishment of plan

Named fiduciaries

(a) (1) Every employee benefit plan shall be established and maintained pursuant to a written instrument. Such instrument shall provide for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan.

(2) For purposes of this subchapter, the term "named fiduciary" means a fiduciary who is named in the plan instrument, or who, pursuant to a procedure specified in the plan, is identified as a fiduciary (A) by a person who is an employer or employee organization with respect to the plan or (B) by such an employer and such an employee organization acting jointly.

Requisite features of plan

(b) Every employee benefit plan shall—

(1) provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of this subchapter,

(2) describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan (including any procedure described in section 1105(c) (1) of this title),

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan, and

(4) specify the basis on which payments are made to and from the plan.

Optional features of plan

(c) Any employee benefit plan may provide—

(1) that any person or group of persons may serve in more than one fiduciary capacity with respect to the plan (including service both as trustee and administrator);

(2) that a named fiduciary, or a fiduciary designated by a named fiduciary pursuant to a plan procedure described in section 1105(c) (1) of this title, may employ one or more persons to render advice with regard to any responsibility such fiduciary has under the plan; or

(3) that a person who is a named fiduciary with respect to control or management of the assets of the plan may appoint an investment manager or managers to manage (including the power to acquire and dispose of) any assets of a plan.

Pub. L. 93-406, Title I, § 402, Sept. 2, 1974, 88 Stat. 875.

§ 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c) (3) of this title.

(b) Exceptions

The requirements of subsection (a) of this section shall not apply—

(1) to any assets of a plan which consist of insurance contracts or policies issued by an insurance company qualified to do business in a State;

(2) to any assets of such an insurance company or any assets of a plan which are held by such an insurance company;

(3) to a plan—

(i) some or all of the participants of which are employees described in section 401(c) (1) of Title 26; or

(ii) which consists of one or more individual retirement accounts described in section 408 of Title 26, to the extent that such plan's assets are held in one or more custodial accounts which qualify under section 401(f) or 408(h) of Title 26, which ever is applicable;

(4) to a plan which the Secretary exempts from the requirement of subsection (a) of this section and which is not subject to any of the following provisions of this Act—

(A) part 2 of this subtitle,

(B) part 3 of this subtitle, or

(C) subchapter III of this chapter; or

(5) to a contract established and maintained under section 403(b) of Title 26 to the extent that the assets of the contract are held in one or more custodial accounts pursuant to section 403(b) (7) of Title 26.

(6) Any plan, fund or program under which an employer, all of whose stock is directly or indirectly owned by employees, former employees or their beneficiaries, proposes through an unfunded arrangement to compensate retired employees for benefits which were forfeited by such employees under a pension plan maintained by a former employer prior to the date such pension plan became subject to this chapter.

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

(2) (A) In the case of a contribution, or a payment of withdrawal liability under part 1 of subtitle E of subchapter III of this chapter—

(i) made by an employer to a plan (other than a multiemployer plan) by a mistake of fact, paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the payment of the contribution, and

(ii) made by an employer to a multiemployer plan by a mistake of fact or law (other than a mistake relating to whether the plan is described in section 401(a) of Title 26 or the trust which is part of such plan is exempt from taxation under section 501(a) of Title 26), paragraph (1) shall not prohibit the return of such contribution or payment to the employer within 6 months after the plan administrator determines that the contribution was made by such a mistake.

(B) If a contribution is conditioned on qualification of the plan under section 401, 403(a), or 405(a) of Title 26, and if the plan does not qualify, then paragraph (1) shall not prohibit the return of such contribution to the employer within one year after the date of denial of qualification of the plan.

(C) If a contribution is conditioned upon the deductibility of the contribution under section 404 of Title 26, then, to the extent the deduction is disallowed, paragraph (1) shall not prohibit the return to the employer of such contribution (to the extent disallowed) within one year after the disallowance of the deduction.

(3) In the case of a contribution which would otherwise be an excess contribution (as defined in section 4972(b) of Title 26) paragraph (1) shall not prohibit a correcting distribution with respect to such contribution from the plan to the employer to the extent permitted in such section to avoid payment of an excise tax on excess contributions under such section.

(4) In the case of a withdrawal liability payment which has been determined to be an overpayment, paragraph (1) shall not prohibit the return of such payment to

the employer within 6 months after the date of such determination.

(d) (1) Upon termination of a pension plan to which section 1321 of this title does not apply at the time of termination and to which this part applies (other than a plan to which no employer contributions have been made) the assets of the plan shall be allocated in accordance with the provisions of section 1344 of this title, except as otherwise provided in regulations of the Secretary.

(2) The assets of a welfare plan which terminates shall be distributed in accordance with the terms of the plan, except as otherwise provided in regulations of the Secretary.

Pub. L. 93-406, Title I, § 403, Sept. 2, 1974, 88 Stat. 876.

§ 1104. Fiduciary duties

(a) (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless un-

der the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d) (3) of this title), the diversification requirement of paragraph (1) (C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1) (B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d) (4) and (5) of this title).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

Pub. L. 93-406, Title I, § 404, Sept. 2, 1974, 88 Stat. 877.

§ 1105. Liability for breach of co-fiduciary

Circumstances giving rise to liability

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

Assets held by two or more trustees

(b) (1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees—

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated

shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities

(c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104 (a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

Investment managers

(d)(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

Pub.L. 93—406, Title I, § 405, Sept. 2, 1974, 88 Stat. 878.